APPEAL NO. 93106

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1993). On January 7, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant, claimant herein, received notice in 1991 that his first impairment rating was 0% and did not dispute it until August 1992; therefore, no impairment benefits are payable. Claimant appeals by disputing each finding of fact made, including Finding of Fact No. 4, which stated that a copy of claimant's impairment rating was attached to his notice that benefits were terminated, that claimant received in late May or June of 1991. Respondent, carrier herein, replied that there was sufficient evidence to support the decision.

DECISION

Finding that the evidence is sufficient to support the decision and order, we affirm.

Claimant is an iron worker who is 38 years old and began work for (employer) in December 1989. On (date of injury), he fell off a beam and twisted his back when he caught himself on another beam. He received temporary income benefits (TIBS) until May 21, 1991. On April 12, 1991, claimant's doctor, (Dr. C), found that
he had reached maximum medical improvement with no impairment. Dr. C's records indicated that in April 1991, he explained the results of a functional capacity test to claimant indicating that there were no significant functional limitations. These records also state that on April 12, 1991, claimant was released from further treatment and reached maximum medical improvement.

Claimant acknowledged at the hearing that around May 1991 he received the carrier's notice (carrier's exhibit 1) that the last payment of benefits to him was made on May 21, 1991. He understood the notice he received to indicate that the carrier had paid all the money that it thought was due to him. Claimant maintained, however, that he did not receive notice of his impairment rating until July 28, 1992, when the Commission provided it, and thereafter disputed that rating within the 90 days provided by Tex. W.C. Comm'n, TEX. ADMIN. CODE § 130.5(e) [Rule 130.5 (e)].

(Mr. C) testified that he has worked for the carrier for eight years and has been the adjuster in regard to claimant's case file since March 1992. He has no personal knowledge of the transactions occurring with claimant's case file in 1991, but is familiar with the normal procedures the carrier uses in managing a claim. He stated that it is "automatic" to attach a copy of the TWCC-69 or any meaningful document to the notice of termination of benefits that was sent both to the Commission and to the claimant. In providing this testimony, Mr. C specifically referred to carrier's exhibit 1 as the notice of termination of benefits. Mr. C added that when the Commission requested the carrier to state why TIBs were suspended in a form request made in June 1992, he went to the carrier's file on this claim and observed that the carrier's copy of the TWCC form 69 was

attached to its copy of carrier exhibit 1. Mr. C opined from this attachment of the two documents that they had been submitted together to the Commission and claimant when originally sent in 1991. Mr. C then sent copies of each to the Commission per its request. (We note that carrier's exhibit 1 states on its face that the reason for termination of payments was "Clmt released to RTW" [return to work, apparently]--conceivably the carrier attached the TWCC-69 to this document in 1991 but mistakenly attributed termination of TIBs to return to work, not MMI).

Claimant acknowledges that he did receive correspondence from time to time from the Commission and the carrier, and at times the correspondence contained more than one document in the envelope. He maintains, though, that he did not get an impairment rating in any form prior to July 1992, which he then disputed in August 1992. He agrees that he usually called the sender when he received some type of workers' compensation form. He does not recall, though, whether he ever called the carrier to inquire why his TIBs had stopped in May 1991. He did inquire of both the Commission and the carrier after he received the July 1992 notice in regard to an impairment rating. He also submitted an impairment rating of (Dr. O), of 7% based on an October 12, 1992 evaluation, which was accepted into evidence as claimant's exhibit 3. Dr. O, however, states that claimant had a car accident after he was rated as having no impairment in April 1991, and Dr. O cannot tell whether the disc problem he found came from one or the other. Claimant testified that his car accident was on March 24, 1992. He said it was rated as "a two or something" in answer to a question of whether his vehicle had slight or significant damage. He was shaken up, and after a period did see a doctor but did not have therapy for that accident. He has not worked since the compensable injury and still does not work.

The hearing officer's findings of fact, other than Finding of Fact No. 4 previously described, were not in dispute and will not be described in the context of the evidence that supports them, with the exception of Finding of Fact No. 1. This finding said that claimant requested the hearing be held in Tyler. (At the time of the accident, claimant lived in (city), Texas, and at the time of the hearing, claimant lived in (city), (state.) Claimant disputed this finding, as he did all findings, but the record clearly shows that the hearing officer asked, "(y)ou want to have the hearing today in (city), Texas?" The claimant replied, "yes". Claimant's attorney stated that she had no objection to the hearing being held in Tyler after the hearing officer announced the claimant's right to a hearing within 75 miles of his residence at the time of injury.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. He could give weight to the recitation of the carrier's normal practice of sending a copy of the TWCC form 69 with the notice of termination of benefits, especially in light of the testimony of Mr. C as to how he found these documents attached to each other in claimant's claim file. He could consider that

claimant does not recall whether he inquired about the fact that his TIBs were stopped. He could also consider the length of time between May 1991 and August 1992 when claimant disputed his impairment rating, especially since he testified he could not work during this period.

The hearing officer can resolve conflicting evidence against the claimant, who is an interested party. *See* Bullard v. Universal Underwriters Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ) and Presley v. Royal Indemnity Insurance Co., 557 S.W.2d 611 (Tex. Civ. App.-1977 Texarkana, no writ). The findings of fact, including Finding of Fact No. 4 that claimant received notice of the impairment rating in 1991, are supported by sufficient evidence of record. The conclusions of law, including that claimant failed to prove that he disputed his first impairment rating within 90 days, are supported by the findings of fact and evidence of record. The order is not against the great weight and preponderance of the evidence and is affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge